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# NOTES AND COMMENTS

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## ARREST

### THE LAW OF ARREST

When a crime has been committed, ordinarily the first step in the prosecution of the accused is to arrest him. An arrest, said Justice Merrimon in *Lawrence v. Buxton*,<sup>1</sup> "is intended to serve, and does serve, the end of bringing \* \* \* the person arrested personally within the custody and control of the law." The arrest may be made in two ways. It may be accomplished, under proper circumstances, by an officer or a private person without a warrant, or it may be made with a warrant issued by the proper authority.

### ARREST WITHOUT WARRANT

In many cases the ends of justice would be defeated, if no arrest could be made without a warrant, for while a warrant is being procured the offender may escape. Therefore, let us consider the situations, at common law and under statutes, in which a person may be arrested for a felony, breach of peace or other misdemeanor by an officer or a private person without a warrant.

An officer may arrest a person without a warrant to prevent him from committing a felony.<sup>2</sup>

Both at common law and under the statutes of many states, it is clearly established that an officer may arrest without a warrant for a felony committed in his presence.<sup>3</sup> The policy of the law is that no felon has any right to complain about being caught.<sup>4</sup>

<sup>1</sup> 102 N.C. 129, 131, 8 S.E. 774 (1889).

<sup>2</sup> This rule is exemplified in a case where a man was arrested without a warrant to prevent him from murdering his wife. *Hancock v. Baker*, 2 Bos. & P. 260 (1800). The common law rules can be found in 9 Halsbury, pp. 296-307, secs. 607-617; with supplements, 1934, sec. 613; and for a detailed discussion of the problem see Wilgus, *Arrest Without Warrant*, 22 Mich. 541, 673, 798 (1924).

<sup>3</sup> Thus, arrests were legally made without a warrant where an officer caught the accused carrying concealed weapons, *Porello v. State*, 121 Ohio St. 280, 29 Ohio L.R. 398, 168 N.E. 135 (1929); *Steif v. Cincinnati*, 19 Ohio Dec. (N.P.) 484, 6 Ohio L.R. 602 (1909); *Drolesbaugh v. Hill et al.*, 64 Ohio St. 264, 60 N.E. 202 (1901); discovered intoxicating liquor in plain sight in the house of the accused, *Peo. v. Harter*, 244 Mich. 346, 221 N.W. 302 (1928); caught one operating a house of ill-fame, *Wolf v. State*, 19 Ohio St. 248 (1869); and seized a drunken person who took a shot at him, *Partin v. Comm.*, 197 Ky. 840, 248 S.W. 489 (1923). Ohio G. C. sec. 13432-1; Ala. Code 1923, sec. 3263; Cal. Penal Code, 1925 sec. 836; Mich. Pub. Acts, 1927, No. 175, Ch. IX, sec. 15(b); *Wahl v. Walton*, 30 Minn. 506, 16 N.W. 397 (1883); *U. S. v. Rembert*, 284 Fed. 996 (1922); *Howard v. State*, 137 Ark. 111, 208 S.W. 293 (1918); *Elswick v. Comm.*, 202 Ky. 703, 261 S.W. 249 (1924); *Harper v. State*, 84 Tex. Cr. Rep. 345, 207 S.W. 96 (1918).

<sup>4</sup> *Brooks v. Comm.* 61 Pa. 352, 100 Am. Dec. 645 (1869).

It is a general rule that an officer may arrest without a warrant when a felony has in fact been committed and he has reasonable cause to believe that the person to be arrested has committed it,<sup>5</sup> whether there be time to get a warrant or not.<sup>6</sup> If a felony has not in fact been committed, an officer will be justified if he acted on reasonable grounds and in good faith<sup>7</sup> in arresting the supposed felon, but generally a private person will be liable to a false imprisonment action unless a statute protects him.<sup>8</sup>

There is a difference of opinion among English authorities regarding the right of an officer to arrest without a warrant on reasonable grounds to believe that a felony has been committed.<sup>9</sup> Blackstone says an arrest can be made without a warrant only in case a felony has actually been committed or on suspicion where there has been a dangerous wounding.<sup>10</sup> In *Samuel v. Payne*,<sup>11</sup> it was stated that an officer could arrest without a warrant on reasonable cause to believe that a felony had been committed even though no felony had in fact been committed. The same rule is adopted in *Lawrence v. Hedger*,<sup>12</sup> which was an arrest of a person night walking who was suspected on reasonable grounds to be about to commit a felony. The settled rule at common law in this country is that an officer may arrest without a warrant on suspicion of a felony where he has reasonable grounds to believe (a) that a felony has been committed, and (b) that the person arrested has committed it.<sup>13</sup> This rule is adopted in the statutes of several states.<sup>14</sup>

<sup>5</sup> A provision to this effect can be found in the following statutes: Ill. Rev. Stat., 1925, ch. 38, sec. 681; Oregon Olson's Laws, 1920, sec. 1763; Ohio G. C. 13432-2; *Amer. Ry. Ex. Co. v. Summers* (Ala., 1923), 94 So. 737; *Somerset Bank v. Edmund*, 76 Ohio St. 396, 81 N.E. 641 (1907); *Mangino v. Todd*, 19 Ala. App. 486, 98 So. 323 (1923); *State v. Dunivan*, 217 Mo. App. 548, 269 S.W. 415 (1925); *State v. Bradshaw*, 53 Mon. 96, 161 Pac. 710 (1916); *Douglass v. State*, 152 Ga. 379, 110 S.E. 168 (1921); *Collins v. Comm.*, 192 Ky., 412, 233 S.W. 896 (1921); *Speris v. Comm.*, 207 Ky. 455, 269 S.W. 532 (1925); *McKenna v. Whipple*, 97 Conn. 695 (1922); *State v. Gartland*, 304 Mo. 87, 263 S.W. 165 (1924).

<sup>6</sup> *Holley v. Mix*, 3 Wend (N.Y.) 351 (1829).

<sup>7</sup> *Carr v. State*, 43 Ark. 99 (1884).

<sup>8</sup> See note 6, *supra*. Also the Amer. Law Inst., Code of Crim. Proc. (April 9, 1928), commentary on pp. 156-159.

<sup>9</sup> Amer. Law Inst., Code of Crim. Proc. (April 9, 1928), commentary, p. 153.

<sup>10</sup> Book IV, 292.

<sup>11</sup> 1 Doug. 359 (1780).

<sup>12</sup> 3 Taunt. 13 (1810); Lord Halsbury, Laws of England, Vol. 9, sec. 611, page 298 states the same unqualified rule that is found in *Samuel v. Payne*, *supra*, note 11.

<sup>13</sup> *Doering v. State*, 49 Ind. 56 (1874); *Filer v. Smith*, 96 Mich. 347, 55 N.W. 999 (1893); *Creagh v. Gamble*, 24 L.R. Irish, 458 (1887); *State v. Evans*, 161 Mo. 95, 84 Am. St. Rep. 669 (1907); *State v. Whitley* (Mo. 1916), 183 S.W. 317.

<sup>14</sup> North Car. Consol. Stat., 1931, sec. 4544; Ark. Dig. of Stat., 1921, sec. 2904; Ala. Code, 1928 and cumulative supplement of 1936, sec. 3263; Ohio G. C., sec. 13432-2, "When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained;" S.C. Code of Laws, 1912, Crim. Code secs. 907 and 908; Okl. Comp. Stat., Secs. 2471 and 2473.

Under the two preceding rules the question of what constitutes reasonable grounds often arises. The Ohio and Illinois courts have laid down the test generally followed, that reasonable grounds exist when the circumstances are sufficiently strong in themselves to warrant a reasonable and prudent person in believing the accused to be guilty of a felony.<sup>15</sup>

At common law, an officer might arrest without a warrant for a breach of the peace committed in his presence.<sup>16</sup> The same rule is applicable today.<sup>17</sup> The term "breach of the peace" is generic and includes riots, routs, unlawful assemblies, forcible entry detainer, affrays, public or private prize fights, the wanton discharge of firearms near the bed-chamber of a sick person and many other offenses.<sup>18</sup> "Commonly and more narrowly it signifies any criminal act of a sort to disturb the public repose."<sup>19</sup> A disturbance in a school,<sup>20</sup> an intoxicant yelling and raising a disturbance in a village,<sup>21</sup> and a disturbance in a home raised by wife-beating<sup>22</sup> have been held to constitute breaches of the peace for which

<sup>15</sup> *Bock v. City of Cincinnati*, 43 Ohio App. 257, 183 N.E. 119 (1931); Petition of the city of Cincinnati dismissed in 124 Ohio St. 666, 181 N.E. 119 (1931); *People v. Bressler*, 223 Mich. 597 (1923); *People v. Ford*, 356 Ill. 572, 191 N.E. 315 (1934); *People v. Roberts*, 352 Ill. 189, 185 N.E. 253 (1933); *People v. Scalisi*, 324 Ill. 131, 154 N.E. 715 (1926). The following has been held to constitute reasonable grounds for arrest without warrant: where an officer, acting on a bona fide belief, resulting from suspicious moves of the accused, finds concealed weapons on his person, *Trimble v. Cincinnati*, 30 N.P. (N.S.) 227 (1932); where a sheriff, acting on information from an apparently reliable source, catches the accused transporting liquor, *People v. Mohl*, 252 Mich. 469, 233 N.W. 383 (1930); *People v. Benner*, 243 Mich. 688, 220 N.W. 714 (1928); on information the officer finds a still in *Mapp v. State*, 148 Miss. 739, 114 So. 825 (1927); where the accused, in answer to the question of an officer as to what he had in his motorboat, replied, "Beer," in *Daisen v. United States*, 4 Fed. (2nd) 382 (1924); where an officer arrested a formerly convicted chicken thief who was seen carrying a sack full of chickens, *Turner v. Comm.*, 191 Ky. 825, 231 S.W. 519 (1921); and where agents acted on telephone orders received by the arrested person for the delivery of liquor at a certain time and place, *Altshuler v. U. S.*, 3 Fed. (2nd) 791 (1925). The following was held not to justify an arrest without a warrant on reasonable cause: where an officer merely saw a person hand two bottles to another, *Testolin v. State*, 188 Wis. 275, 205 N.W. 825 (1925); where an officer acted on mere suspicion, *Cook v. Singer Sewing Mach. Co.*, 138 Cal. App. 418 (1934); *U. S. v. Schultz* (U. S. D. C. of Ariz. 1933), 3 Fed. Supp. 273; *Reed v. Philpot's Admin.*, 235 Ky. 429, 31 S.W. (2d) 709 (1930); *Coffey v. State*, (Okla. Cr. App. 1927) 258 Pac. 923; *U. S. v. Wiggins* (U. S. D. C. of Min. 1927), 22 Fed. (2d) 1001; where an officer acted only on an anonymous tip, *People v. Ward*, 226 Mich. 45, 196 N.W. 971 (1924); where an arrest was made on hearing a cry "hold-up," *People v. Mirabelle*, 276 Ill. App. 533 (1934); and where an officer based his arrest on a telegram from a private person, *Jones v. Watson*, 119 La. 491, 44 So. 275 (1907).

<sup>16</sup> Blackstone, Book IV, 292.

<sup>17</sup> *Mangino v. Todd*, 19 Ala. App. 486, 98 So. 323 (1923).

<sup>18</sup> *People v. Bartz*, 53 Mich. 493, 19 N.W. 161 (1884). As to what constitutes breach of the peace see Wilgus, Arrest Without Warrant, 22 Mich. L. Rev. 573-575 (1924); and see an excellent annotation on the extension of the breach of the peace concept by statutes and ordinances in Ann. Cas. 1917c pp. 889-901, based upon *Delk v. Comm.*, 166 Ky. 39 (1919).

<sup>19</sup> Bishop on Criminal Law, 9th Ed., sec. 536 (1923).

<sup>20</sup> *Douglas v. Barber*, 18 R.I. 459, 28 Atl. 805 (1894).

<sup>21</sup> *People v. Johnson*, 86 Mich. 175, 48 N.W. 870 (1891).

<sup>22</sup> *Comm. v. Tobin*, 108 Mass. 426, 11 Am. Rep. 375 (1871); *Ramsey v. State*, 92 Ga. 53, 17 S.E. 613 (1893).

arrests without warrants were legal. But an arrest cannot be legally made if the breach of the peace is past.<sup>23</sup>

At common law there is a difference of opinion among authorities as to whether an officer may arrest without a warrant for all misdemeanors committed in his presence. Blackstone<sup>24</sup> limits such arrest to a breach of the peace committed in the presence of an officer and to night watchmen who may arrest night walkers, and imprison them until morning. Russell, on Crimes,<sup>25</sup> says that an "officer may arrest any person who in his presence commits a misdemeanor or breach of the peace." Lord Halsbury<sup>26</sup> restricts legal arrests without a warrant for misdemeanors committed in the presence of an officer to breaches of the peace. Such confusion is not found in the United States because statutes and municipal charters have quite generally authorized an officer to arrest without a warrant for any misdemeanor committed in his presence.<sup>27</sup> It is ordinarily held that an officer cannot arrest a person without a warrant for a past misdemeanor.<sup>28</sup> Cases have held statutes and ordinances conferring authority on an officer to make an arrest without a warrant for a misdemeanor not committed in his presence unconstitutional,<sup>29</sup> on the ground of deprivation of personal liberty without due process of law.<sup>30</sup> Illinois, however, by statute permits an officer to arrest without a warrant for past misdemeanors,<sup>31</sup> and a Missouri statute restricts arrests without a warrant for past misdemeanors to cities of 300,000 or over.<sup>32</sup>

The phrase "in his presence" in connection with arrests without a warrant for felonies and misdemeanors has been liberally interpreted by the courts. Thus, the courts have held a crime to have been commit-

<sup>23</sup> *State v. Lewis*, 50 Ohio St. 179, 33 N.E. 405 (1893).

<sup>24</sup> Book IV, 292.

<sup>25</sup> 7th Eng. (Ed.) 725 (1910).

<sup>26</sup> Laws of England, Vol. 9, p. 299.

<sup>27</sup> Ohio G. C., sec. 13432-1; Iowa Code, 1931, sec. 13,468; Ky. Car. Codes, 1927, Crim. Proc., sec. 36; Min. Rev. Stat., 1927, sec. 10570; Mont. Rev. Codes, 1921, sec. 11753; Neb. Comp. Stat., 1929, sec. 29-401; Ore. Oleson's Laws, 1920, sec. 1763; *Ashby v. State*, (Okl. Cr. App., 1926) 243 Pac. 1003; *Edwards v. State*, 163 Md. 298, 162 Atl. 856 (1932); *Brewer v. Wynne*, 163 N.C. 319, 79 S.E. 629 (1913); *Erie R. Co. v. Reigherd*, 7 Ohio L.R. 485, 166 Fed. 247 (1909).

<sup>28</sup> *Doering v. State*, *supra*, note 13; *Taylor v. State*, 118 Okl. 262, 247 Pac. 377 (1926); *Vinson v. Com.*, 219 Ky. 482, 293 S.W. 984 (1927); *People v. Defore*, 242 N.Y. 13, 15 N.E. 585 (1926); *Munzebrock v. State*, 10 Ohio D.R. 277, 19 Wk. L. Bull. 389 (1886); *Hopper v. Mabley and Carew Co. et al.*, 14 Ohio Dec. (N.P.) 236 (1903).

<sup>29</sup> *In re Kellam*, 55 Kan. 700, 41 Pac. 960 (1895); *Pinkerton v. Verberg*, 78 Mich. 573, 18 Am. St. Rep. 473 (1889).

<sup>30</sup> See note 30, *supra*.

<sup>31</sup> *People v. Ford*, 356 Ill. 572, 191 N.E. 315 (1934); Sec. 4, div. 6 of The Crim. Code (Cahill's Illinois Stat., 1933, p. 1078); *People v. Roberts* and *People v. Scalisi*, *supra*, note 15.

<sup>32</sup> Missouri Rev. Stat., 1909, sec. 9805; *Hanson v. Bieber*, 271 Mo. 326, 197 S.W. 68 (1917).

ted "in the presence of" an officer where the officer has been apprised by his sense of sight, sound, or smell that a crime was being committed.<sup>33</sup>

An officer may arrest and detain a person for a reasonable time<sup>34</sup> until a warrant can be obtained.<sup>35</sup> The question of what is an unreasonable delay is left to the jury.<sup>36</sup>

It is the duty of a private person who is present when a felony is committed to apprehend the felon without a warrant.<sup>37</sup> At common law and by the great weight of authority in the American courts, a private person may arrest without a warrant where a felony has in fact been committed and he has reasonable grounds to believe that the person arrested is the guilty party.<sup>38</sup> Nothing short of proving the felony will justify the arrest.<sup>39</sup> A few states hold that the felony must have been

<sup>33</sup> The crime was committed in the presence of the officer *when he saw*: the defendant picking up a jar of whiskey concealed in a field, *Fletcher v. Com.*, 96 Ky. 625, 245 S.W. 134 (1922); a person operating a whiskey still, *Barton v. State* (Okl. Cr. App. 1924) 222 Pac. 272; the flash of a pistol at a distance in the dark, *People v. Bartz*, *supra*, note 18; *when he heard*: an intoxicant yelling and raising a disturbance in a village, *People v. Johnson*, *supra*, note 21; accused raising a disturbance in his house, *Com. v. Tobin*, *supra*, note 22; shots fired, and on rushing to the scene found the offender with evidence of the crime on him, *Piedmont Hotel Co. v. Henderson*, 9 Ga. App. 672, 72 S.E. 51, 55 (1911); *when he smelled*: the fumes from a still, *McBride v. U. S.*, 261 U. S. 614, 143 Sup. Ct. 359, 67 L.Ed. 827 (1922); the odor of fermenting mash, *Miller v. U. S.*, 9 Fed. (2d) 382 (1926); opium fumes emanating from a building and caught the smoker, *U.S. v. Fisher*, 38 Fed. (2d) 830 (1930). The crime was committed in the presence of the officer *when he caught*: the defendant peddling without a license in breach of an ordinance, *Conrad v. Lengel*, 110 Ohio St. 532, 144 N.E. 278 (1924); a person begging in violation of the vagrancy law, *State v. Fate*, Ohio 7 N.P. 543, 5 Ohio Dec. 732 (1897); the accused assisting in the placing of bets on horse races, *Dunning v. Cincinnati*, 21 N.P. (N.S.) 468, 29 Ohio Dec. 472 (1919); a person carrying concealed weapons, *Ballard v. State*, 43 Ohio St. 340, 1 N.E. 76 (1885). The following facts did not constitute crimes committed in the presence of an officer where: the officer saw, on entering a store, a memorandum pad from which he shook race horse slips, *Bock v. Cincinnati*, 43 Ohio App. 257, 183 N.E. 119 (1931), petition dismissed on appeal by the city in 124 Ohio St. 666, 181 N.E. 119 (1931); where the officer himself provokes the crime, *Scott v. Feilsschmidt*, 191 Iowa 347, 182 N.W. 382 (1921); and where the officer does not hear a person cursing although he is within hearing distance, *Smith v. State*, 10 Ga. App. 36, 72 S.E. 527 (1911).

<sup>34</sup> *Eichenlaub v. State*, 36 Ohio St. 140 (1880). The arrest and detention of the accused for one hour was not unreasonable in *Conrad v. Lengel*, *supra*, note 34.

<sup>35</sup> *Conrad v. Lengel*, *supra*, note 34; *Murray v. State*, 6 N.P. (N.S.) 155, 18 O.D. 286 (1907); Ohio G. C., sec. 13432-3.

<sup>36</sup> *Raitz v. Green*, 13 Ohio C. C. 455, 7 Ohio C. Dec. 238 (1897).

<sup>37</sup> *Long v. State*, 12 Ga. 293 (1852).

<sup>38</sup> 2 Hawk. P.C., Chap. 12, sec. 1; *Ashley's Case*, 12 Coke 90; Ohio G. C., *supra*, note 5, includes a private person; *Brooks v. Comm.*, *supra*, note 4; *Kennedy v. State*, 107 Ind. 144, 6 N.E. 305 (1886); *Broway v. Crawford*, 48 N.C. 433, 67 Am. Dec. 250 (1856); *Renck v. McGregar*, 32 N.J. Law 70 (1866); *Burch v. Franklin*, 7 Ohio N.P. 155, 7 Ohio Dec. 519 (1897); *Fouts v. State*, 113 Ohio St. 450, 149 N.E. 551 (1925); *Pco. v. Ostrosky*, 160 N.Y.S. 493, 15 Misc. Rep. 104 (1916); *Com. v. Mecuso*, 273 Pa. 474, 117 Atl. 211 (1922); *Burkhardt v. State*, 83 Tex. Cr. Rep. 228, 202 S.W. 513 (1918).

<sup>39</sup> *Beckwith v. Philby*, 6 Barn. & C. 635 (1827); *Comm. v. Carey*, 12 Cush. (Mass.) 246 (1853); *Allen v. Lopinsky*, 81 W. Va. 13, 94 S.W. 369 (1917); *Demson v. Baker*, 144 La. 167, 80 So. 238 (1918).

committed by the person arrested to justify the arrest,<sup>40</sup> but most courts do not follow such a restriction and hold that a felony committed by any person may justify the arrest.<sup>41</sup> There are some statutes that permit a private person to make an arrest for a felony, not committed in his presence, where he has reasonable grounds to believe the person arrested committed a felony, although no felony was in fact committed.<sup>42</sup> As a rule, a private person cannot arrest without a warrant for a misdemeanor, even when it is committed in his presence.<sup>43</sup> However, it is otherwise by statute in many states.<sup>44</sup> A private person may arrest to stop any breach of the peace committed in his presence<sup>45</sup> without a warrant, but he will be responsible to a false imprisonment action if he makes the arrest after the breach of the peace has ended.<sup>46</sup>

### SEARCH AND ARREST WITHOUT WARRANT

It is a well settled rule that the right to search is incidental to legal arrest without a warrant.<sup>47</sup> Thus, the courts have upheld the following searches and seizures: search of premises and seizure of property illegally used or evidence to prove the crime charged;<sup>48</sup> search of the accused person and seizure of the instrumentalities of crime;<sup>49</sup> and the search of

<sup>40</sup> *Rohan v. Swain*, 5 Cush. (Mass.) 281, 285 (1850); *Morley v. Chase*, 143 Mass. 396, 398 (1887); *Wrexford v. Smith*, 2 Root (Conn.) 171 (1795); *dictum* in *Palmer v. Cent. Railroad Co.*, 92 Me. 409 (1899).

<sup>41</sup> *Wilgus*, Arrest Without Warrant, 22 Mich. L. Rev. 692 (1924); *Enright v. Gibson*, 219 Ill. 550, 76 N.E. 689 (1906); *Kennedy v. State*, 107 Ind. 144, 57 Am. St. Rep. 99 (1886).

<sup>42</sup> *Carroll's Ky. Codes*, 1927, Crim. Prac., sec. 37; *Mann v. Com.*, 118 Ky. 800 (1904); *Mississippi Hem. Code*, 1927, sec. 1265; *South Car. Code of Laws*, 1932, Chap. 57, sec. 907; *State v. Griffin*, 74 S.C. 412 (1906); *Ohio G. C.*, *supra*, note 5.

<sup>43</sup> Leading case in the common law, *Fox v. Gaunt*, 3 Barn. & Ad. 798 (1832); *Price v. Seeley*, 10 Clark & F. 28 (1843); *Wooding v. Oxley*, 9 Car. & P. 1 (1839).

<sup>44</sup> *Miss. Hem. Code*, 1927, sec. 1262; *Mon. Rev. Codes*, 1921, sec. 11,754; *Ga. Code*, 1926, *Park's Penal Code*, sec. 921.

<sup>45</sup> *Timothy v. Simpson*, 1 Crompt. M. & R. 757 (1835).

<sup>46</sup> *Phillips v. Trull*, 11 Johns. (N. Y.) 487 (1814).

It would be well to conclude the present discussion of arrest without a warrant by quoting the *Ohio G. C.*, sec. 13432-5 to the effect that: "When an arrest is made without a warrant by an officer, he shall inform the person arrested of his authority and cause of the arrest; and when the arrest is made by a private person, he shall, before making the arrest, inform the person to be arrested, of the intention to arrest him and the cause of the arrest; except that when a person is engaged in the commission of a criminal offense, it shall not be necessary to inform him of the cause of his arrest." Similar statutes may be found in the *Min. Rev. Stat.*, 1927, sec. 10574; *Iowa Code*, 1931, sec. 13471; *Ky. Car. Codes*, 1927, sec. 39; *Mon. Rev. Codes*, 1921, sec. 11758.

<sup>47</sup> *Maron v. U. S.*, 8 Fed. (2d) 251 (1925); *People v. Chyc*, 219 Mich. 273, 189 N.W. 70 (1922); *Robertson v. Comm.*, 198 Ky. 699, 249 S.W. 1010 (1923); *State v. Pluth*, 157 Min. 145, 195 N.W. 789 (1923).

<sup>48</sup> *Pickett v. Martucci's Liquors*, 112 Conn. 169, 151 Atl. 526 (1930); *Cincinnati v. Bush*, 24 Ohio N.P. (N.S.) 81 (1922); *Lee Kwonog Nom v. U. S.*, 20 Fed. (2d) 470 (1927).

<sup>49</sup> *Steyh v. State*, 52 Pac. (2d) 121 (Okla. Cr. App. 1935); *Day v. U. S.*, 27 Fed. (2d) 80 (1929); *State v. Cohn*, 155 Wash. 644, 285 Pac. 665 (1930); *People v. Du-shane*, 240 Mich. 35, 214 N.W. 944 (1927).

automobiles and seizure of illicit goods.<sup>50</sup> Even though a concealed weapon be found, the search is illegal when the arrest is illegal.<sup>51</sup> Search of the defendant's residence was held not to be justified simply because his wife was legally arrested.<sup>52</sup>

### ARREST WITH WARRANT

"In all of the states, either by statute or at common law, warrants of arrest may be issued by any justice of the peace, or other magistrate who is given similar powers, on a proper complaint being made before him, for the arrest of a person who has committed a crime within his jurisdiction, or is reasonably suspected of having committed it. Warrants are generally issued by justices of the peace or police magistrates but they may also, at common law as well as by statute in most states, be issued by a judge of any court of record. If possible, a warrant should be obtained in all cases of arrest."<sup>53</sup>

### REQUISITES OF A WARRANT OF ARREST

It is a provision in all statutes that the warrant be in writing and in the name of the state where it is issued,<sup>54</sup> and it has been held that a warrant not issuing in the name of the state is invalid.<sup>55</sup>

The warrant must be issued by a magistrate, judge, or justice of the peace having jurisdiction of the subject matter.<sup>56</sup> The warrant may be issued or not at the discretion of such judicial officers.<sup>57</sup> If a justice of the peace exceeds his jurisdiction in issuing the warrant, he and the person at whose instance he acts will be liable to a false imprisonment action.<sup>58</sup> In Ohio a warrant is properly issued if signed by the clerk of the police court.<sup>59</sup>

The nature of the offense must be substantially set forth in the warrant<sup>60</sup> and the statutes containing provisions on this requisite are of two types: (1) those which provide, in various wordings, that the warrant shall set forth the substance of the complaint,<sup>61</sup> and (2) those

<sup>50</sup> *People v. Allen*, 240 Mich. 491, 215 N.W. 419 (1927); *Houck v. State*, 106 Ohio St. 195, 140 N.E. 112 (1922).

<sup>51</sup> *People v. Macklin*, 353 Ill. 64, 186 N.E. 531 (1933).

<sup>52</sup> *Elg v. State*, 84 S.W. (2d) 237 (1935).

<sup>53</sup> Clark, *Criminal Procedure*, 2nd Ed. p. 27 (1918).

<sup>54</sup> *Lutterloh v. Powell*, 2 N.C. 395 (1796); Ohio G. C., sec. 12432-19.

<sup>55</sup> *Ellis v. Gee*, 5 N.C. 446 (1810); 15 N. Car. Law Rev. 101, *The Law of Arrest* in North Carolina, by Albert Coates, Feb., 1937.

<sup>56</sup> *Raferty v. People*, 69 Ill. 111 (1873).

<sup>57</sup> *Bates v. Black*, 23 N.P. (N.S.) 558 (1915); *Molitor v. State*, 6 Ohio C.C. 263 (1892).

<sup>58</sup> *Truesdell v. Combs*, 33 Ohio St. 186 (1878).

<sup>59</sup> *O'Brien v. Cleveland*, 4 Dec. Rep. 189, 1 Clev. L. Rep. 100 (1878).

<sup>60</sup> *State v. Leach*, 7 Conn. 452 (1829); *Floyd v. State*, 12 Ark. 43 (1849); *Brady v. Davis*, 9 Ga. 73 (1850).

<sup>61</sup> Ohio G. C., *supra*, note 55; Mich. Pub. Acts, 1927, No. 175, Ch. VI, sec. 3; Minn. Gen. Stat., 1923, sec. 10,577; Wis. Stat., 1931, sec. 36102.

which state that the warrant shall specify the offense for which the person is to be arrested.<sup>62</sup>

The warrant shall command that the person against whom the complaint was made be arrested and brought before the magistrate issuing the warrant or, if he is absent or unable to act, before the nearest or most accessible magistrate of the same county.<sup>63</sup>

The constitutions of all but five of the states provide that the warrant shall contain a description of the person to be arrested.<sup>64</sup> In regard to this requisite various situations exist: (1) no constitutional provision, but a statute permitting the use of a fictitious name where the true name is unknown;<sup>65</sup> (2) no constitutional provision, but a statute providing that no name need be inserted when the real name is unknown;<sup>66</sup> (3) a constitutional provision requiring the description of the accused;<sup>67</sup> and (4) a constitutional provision requiring a description of the accused plus a statute permitting the use of any name if the true name is unknown.<sup>68</sup>

In Ohio the warrant must state the time when issued, the municipality or county where it is issued, and be signed by the magistrate (or his clerk) with the title of his office.<sup>69</sup>

In the majority of the states the warrant must be directed to and executed by a peace officer.<sup>70</sup> If no officer is available, some jurisdictions allow the magistrate to direct the warrant to a private person who may execute the same.<sup>71</sup>

## ISSUANCE OF WARRANT — COMPLAINT

To authorize the issuance of a warrant before indictment at common law and in many states, there must be made before the proper magistrate a complaint, on oath or affirmation,<sup>72</sup> showing that a crime has been committed<sup>73</sup> and there is probable cause to suspect the accused.<sup>74</sup> The

<sup>62</sup> Cal. Pen. Code, 1931, sec. 814; Ill. Rev. Stat., 1925, Ch. 38, sec. 688; N.Y. Gil. Cr. Code, 1926, Cr. Proc., sec. 152; Iowa Code, 1931, sec. 13462; N.H. Pub. Laws, 1926, Ch. 362, sec. 8.

<sup>63</sup> Ohio G. C., *supra*, note 55; Iowa Code, 1931, sec. 13461; Ore. Olson's Laws, 1920, sec. 1751.

<sup>64</sup> A. L. I., Code of Criminal Proc., April 9, 1928, p. 101.

<sup>65</sup> N.Y. Gil. Cr. Code, 1926, Cr. Proc., sec. 152; *People v. Dunning*, 113 App. Div. 35 (1906).

<sup>66</sup> Ala. Code, 1928, sec. 5221.

<sup>67</sup> U. S. Const. Art. IV; Ark. Const. Art. II, sec. 15; Ill. Const. Art. II, sec. 6; Ind. Const. Art. I, sec. 2; Mich. Const. Art. II, sec. 10; Ohio Const. Art. I, sec. 14.

<sup>68</sup> Cal. Const. Art. I, sec. 19; *People v. Brown*, 59 Cal. 345, 355 (1881); Cal. Pen. Code, 1925, sec. 815.

<sup>69</sup> See note 55, *supra*.

<sup>70</sup> Cal. Pen. Code, 1925, sec. 816; N.Y. Gil. Cr. Code, 1926, Cr. Proc. sec. 153; Ohio G. C., 1929, sec. 13432-9.

<sup>71</sup> Del. Rev. Code, 1915, sec. 3968; Missouri Stat. Anno., sec. 3418.

<sup>72</sup> See note 68, *supra*; Ohio G. C. 13,432, form of affidavit; Ohio G. C., *supra*, note 55, warrant shall contain a copy of the affidavit.

<sup>73</sup> *State v. Burrell*, 86 Ind. 313 (1882); *Housh v. People*, 75 Ill. 487 (1874).

<sup>74</sup> *Comm. v. Phillips*, 6 Pick. (Mass.) 211 (1834).



states have diverse statutes stipulating that a warrant shall be issued on a complaint made: (1) if it appears that any offense has been committed;<sup>75</sup> if the magistrate shall be satisfied that there are reasonable grounds for believing the offense charged has been committed;<sup>76</sup> and if the magistrate from the complaint and any examination of witnesses made by him is satisfied that the offense has been committed and there is reasonable ground to believe that the person charged committed it.<sup>77</sup> An affidavit charging the offense in the language of the statute or ordinance is sufficient and is the safest practice.<sup>78</sup> But where the words of the statute are not sufficient to charge an offense, an affidavit using only the words of the statute is insufficient.<sup>79</sup> Knowledge of the accused that the offense is being committed need not be alleged in the affidavit where it can be implied from the offense.<sup>80</sup> Failure to aver injury to the public in the affidavit makes it defective.<sup>81</sup> An affidavit which avers mere suspicion is insufficient<sup>82</sup> and it is not enough to aver a mere belief,<sup>83</sup> but there must be an averment in the affidavit of personal knowledge and belief.<sup>84</sup> An arrest on a complaint made out by one who personally knew nothing on the subject of the charge except what he obtained from another individual is illegal.<sup>85</sup> A complaint issued on a common rumor was held void.<sup>86</sup>

### WARRANT AS A PROTECTION TO OFFICER

An officer executing the process issued by a court having jurisdiction of the subject matter is protected in the execution thereof, if the warrant be regular on its face and apparently within the jurisdiction of the court issuing the same.<sup>87</sup> If the magistrate unlawfully issues the warrant he, and not the officer executing it, will be liable if the warrant appears regular and legal on its face.<sup>88</sup> The same is true even though the min-

<sup>75</sup> Mich. Pub. Acts, 1927, No. 175, Ch. VI, secs. 2 and 3; Mass. Gen. Laws, 1921, Ch. 276, sec. 22.

<sup>76</sup> Neb. Comp. Stat., 1922, sec. 9964; Ohio G. C., *supra*, note 105; Cal. Penal Code, 1935, sec. 813.

<sup>77</sup> Ala. Code, 1928, sec. 5220; Ore. Olson's Laws, 1920, sec. 1737.

<sup>78</sup> *Emery v. State*, 3 N.P. 204, 5 Ohio Dec. 121 (1896); *Burke v. State*, 104 Ohio St. 220, 135 N.E. 644 (1922); *Brown v. Toledo*, 7 Ohio N.P. 435, 5 Ohio Dec. 210 (1891); *State v. Stiles*, 12 Ohio Dec. 398 (1902); *Morris v. Conneaut*, 20 N.P. (N.S.) 289, 28 Ohio Dec. 83 (1917).

<sup>79</sup> *Groenland v. State*, 4 N.P. 122, 6 Ohio Dec. 313 (1897).

<sup>80</sup> *Brown v. Toledo*, *supra*, note 78.

<sup>81</sup> *Schreier v. St. Bernard*, 19 Ohio Dec. 476, 6 Ohio L. Rep. 598 (1909).

<sup>82</sup> *Johnson v. State*, 82 Ala. 29, 2 So. 466 (1886); *People v. Recorder of Albany*, 6 Hill (N.Y.) 429 (1844).

<sup>83</sup> *Pope v. Cincinnati*, 3 Ohio Cir. Ct. 497, 2 Ohio Cir. Dec. 285 (1888).

<sup>84</sup> *State v. Hobbs*, 39 Me. 212 (1855).

<sup>85</sup> *Romfort v. Fulton*, 39 Barb. (N.Y.) 56 (1861).

<sup>86</sup> *Conner v. Comm.*, 6 Binn. (Pa.) 38 (1810).

<sup>87</sup> *Parker v. Walrod*, 16 Wend. (N.Y.) 514 (1836).

<sup>88</sup> *Sandford v. Nichols*, 13 Mass. 286, 7 Am. Dec. 151 (1816); *Pearce v. Atwood*, 13 Mass. 324 (1816).

isterial or executing officer has knowledge of the facts rendering the warrant void for want of jurisdiction.<sup>89</sup> But where the want or excess of jurisdiction appears on the face of the warrant it affords no protection to the executing officer.<sup>90</sup>

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## BREACH OF PROMISE

### ANTI-HEART BALM LEGISLATION

In an action begun in the New York courts the plaintiff sued to recover damages for the breach of the defendant's promise to marry and for seduction. The New York Court of Appeals held that the plaintiff could not recover inasmuch as the legislature, in a valid exercise of their power, had abolished these causes of action. *Fearon v. Treanor*, 272 N.Y. 268, 5 N.E. (2d) 815 (1936).

At the present time six states including New York (Civil Practice Act, Section 61-a *et seq* Laws 1935, c. 263) have passed what has come to be known as anti-heart balm legislation. This list includes Indiana (Ind. Laws 1935, Ch. 208), Michigan (Public Act 1935, No. 127), Pennsylvania (Pa. Laws 1935, Ch. 263), New Jersey (N.J. Stat. Ann. 1935, par. 163-411 to 163-413), and Illinois (Ill. Rev. Stat. Ch. 38, par. 58(1)-58(6), 1935). These statutes are all substantially the same in character, sec. 61-b of the New York law saying, "The rights of action heretofore existing to recover sums of money as damages for alienation of affections, criminal conversation, seduction, or breach of contract to marry are hereby abolished." The Illinois Statute is the same in this respect although it does not mention the cause of action for seduction (apparently because the legislature was fearful as to the effect this would have upon the parents' cause of action for seduction of a minor daughter). In addition, the Illinois Statute does not purport to abolish the causes of action as such; rather, it makes it unlawful and a felony to file, cause to be filed, threaten to file, or threaten to cause to be filed any pleading or papers of this sort.

The passage of these statutes had been urged for several years prior to the adoption of the first of its kind in March, 1935, by Indiana. The New York legislature advanced as the underlying reasons for the statute's passage that the actions had been made the agency for the commission of crime and the perpetration of frauds. Also, that the

<sup>89</sup> *People v. Warren*, 5 Hill (N.Y.) 440 (1843).

<sup>90</sup> *Sprague v. Birchard*, 1 Wis. 457, 60 Am. Dec. 393 (1853); *Gurney v. Tufts*, 37 Me. 130, 58 Am. Dec. 777 (1853); *People v. Warren*, *supra*, note 124; *McDonald v. Wilkie*, 13 Ill. 22 (1851).